No. 82-1850

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MINNESOTA, by WASHINGTON WILDLIFE PRESERVATION, INC., et al.

Petitioners,

vs.

STATE OF MINNESOTA and its DEPARTMENT OF NATURAL RESOURCES, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF OF RESPONDENT STATE OF MINNESOTA IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Supreme Court of the United States has jurisdiction to review this matter when only one of five causes of action brought by petitioner have been litigated in state court.

2. Whether the Supreme Court of the United States has jurisdiction to hear petitioners' arguments that their property rights under the fifth and fourteenth amendments to the United States Constitution have been violated where the Minnesota Supreme Court did not rule on the nature of the title the Soo Line Railroad received from the original grantors, petitioners' predecessors in title.

3. Whether the Supreme Court of the State of Minnesota determined correctly that the change in the use of a right-of-way from a railroad bed to a public recreational trail does not constitute common law abandonment triggering extinction of the right-of-way for public travel.

4. Whether the purchase of the railroad line by the State of Minnesota pursuant to 49 U.S.C. § 10906 interfered with the Interstate Commerce Commission's plenary and exclusive power over interstate commerce.

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JURISDICTION

Respondents contend there is no jurisdiction under 28 U.S.C. § 1257, subd. 3 because there is nc final judgment by the highest court of the State of Minnesota that would give this Court jurisdiction for 2 reasons:

(1) Petitioners have outstanding four causes of action that have not yet been tried by the trial court. This issue is discussed in Argument I.

(2) The Minnesota Supreme Court did not determine the nature of the original conveyance and who holds what property interest in the right-of-way. Petitioners arguments that their property rights under the fifth and fourteenth amendments to the United States Constitution have been violated are premature. This issue is discussed in Argument II.

STATEMENT OF CASE

On October 7, 1977, the Interstate Commerce Commission issued a Certificate and Order permitting the Soo Line Railroad Company to abandon the right-of-way in question. Petitioners' description of this event is incorrect. The ICC Certificate and Order authorized abandonment, it did not certify the right-of-way as abandoned as claimed by petitioners. (Petition for Writ of Certiorari, page 11.) This document did not certify the right-of-way as abandoned either by statute or by common law. Rather, it gave the Soo Line Railroad permission to negotiate with Burlington Northern Railroad for continued rail service along a portion of the line. With respect to the remaining portion of the line, the Soo Line Railroad was to enter negotiations with the Minnesota Department of Natural Resources. The Interstate Commerce Commission's Certificate and Order indicates that this portion of the line is suitable for other public purposes such as recreation and conservation and any statutory abandonment will be conditioned on a public use in accordance with the plans of the Minnesota Department of Natural Resources.[1] The Certificate and Order appears in the Appendix of this brief as Exhibit A.

[1] The purchase of the right-of-way by the State of Minnesota hardly challenges the jurisdiction of the ICC over railroad abandonment. It was purchased in full compliance with the ICC Certificate and Order.

On August 22, 1980 the State of Minnesota purchased the right-of-way pursuant to its authority under Minn. Stat. § 84.029, subd. 2 [2] and in accordance with the provision of 49 U.S.C. § 10906.[3] Both the federal and the state statutes encourage the continued use of the right-of-way for public purposes.

The petitioners, Washington Wildlife Preservation, Inc., brought an action in Washington County District Court seeking a declaration that they are the true owners of a railroad right-of-way that was purchased from defendant Soo Line Railroad Company by the State of Minnesota and its Department of Natural Resources. Petitioners brought this action under the theory that the Soo Line Railroad held only an easement in the right-of-way which was extinguished upon abandonment of the right-of-way for railroad purposes.

The action was tried before the district court in Washington County, Minnesota. Petitioners moved for a partial summary judgment on their first cause of action relating to their title to the right-of-way. Respondents filed a cross-motion for summary judgment or for dismissal. The district court ruled 1) that title to the railroad land abutting the property of one petitioner was an easement and was extinguished so that plaintiff was the owner free of the easement, and 2) that title to the right-of-way abutting the other nineteen petitioners' property was held by the state in fee simple absolute.

Both parties appealed from this decision to the Minnesota Supreme Court. The Minnesota Supreme Court held that *even if one were to assume the railroad held only an easement in-*

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[2] Minn. Stat. § 84.029, subd. 2 appears in petitioners' Writ of Certiorari at page 11.

[3] 49 U.S.C. § 10906 appears in petitioners' Writ of Certiorari at pages 10-11.

terest[4] in the right-of-way, there has been no abandonment of the easement which would trigger petitioners' reversionary rights, because the use of the right-of-way as a recreational trail is consistent with the purposes for which the easement was originally acquired, public travel, and it imposes no additional burden on the servient estates.

In addition to merely discussing the factual and procedural posture of this case, petitioners also introduced legal arguments on the merits in their section Statement of the Case. (Petition for Writ of Certiorari, pages 14-16). Respondents obviously question the validity of such arguments, but will address them in the appropriate section of this brief, the section entitled "Reasons for Denying the Writ."

SUMMARY OF ARGUMENT

Respondents first urge two distinct reasons for concluding that this Court lacks jurisdiction to hear this case. First, the state court decision is not a final judgment or decree as required by 28 U.S.C. § 1257, subd. 3. Second, the state supreme court has not decided what petitioners' property rights are, so their taking claims under the fifth and fourteenth amendments to the United States Constitution are not ripe for review.

Additionally, certiorari should be denied for other reasons. First, the act of the Soo Line Railroad of selling the

[4] The Minnesota Supreme Court did not determine whether the deeds in question conveyed fee title or an easement. Such a determination was not necessary because of the acceptance, for the sake of argument, by the state supreme court of petitioners' position that the conveyance was an easement and not a fee. It did not affirm or reverse the district court's ruling on the title question. It did reverse the district court's ruling that the one easement interest was abandoned when the railroad terminated rail travel on this line.

right-of-way to the State of Minnesota was achieved without intruding on the constitutional rights of the petitioners and was fully consistent with all applicable federal and state statutes. The Minnesota Supreme Court ruled correctly there has been no abandonment of the right-of-way.

Second, petitioners claim that decisions of other jurisdictions are in conflict with the decision of the Minnesota Supreme Court are unfounded. The three cases cited by petitioners are easily distinguishable from this case and do not present a major conflict with the decisions of this Court, the court of appeals or courts of other states.

Third, the matter of the change of a railroad right-of-way to a public recreational trail in Washington County, Minnesota, is not an issue of such national significance that it should require the Court's attention. In fact, this Court has consistently looked to state substantive law where real property matters are at stake.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE MINNESOTA SUPREME COURT IS NOT A FINAL JUDGMENT OR DECREE UNDER 28 U.S.C. § 1257, BECAUSE IT DOES NOT PRECLUDE PETITIONERS FROM PREVAILING IN STATE COURT ON ANY OF PETITIONERS' FOUR OTHER CAUSES OF ACTION WHICH PETITIONERS HAVE YET TO EITHER LITIGATE OR DISMISS.

The Minnesota Supreme Court notes that petitioners still have outstanding four causes of action that have not yet been tried by the trial court. (Petitioners' Supplemental Appendix, pp. 6-8.) On at least two of the causes of action, the relief sought is that the sale to the Department of Natural Resources

be voided, and the railroad be directed to consummate sale to petitioners. The Minnesota Supreme Court granted discretionary review of the trial court's partial summary judgment in hopes that its decision on the title issue would bring the suit to an end. (Petitioners' Supplemental Appendix, p. 4, n. 1.) But petitioners have not dismissed the remaining causes of action.

This Court does not review a state court decision which is not a "(f)inal judgment or decree". 28 U.S.C. § 1257, subd. 3. The Court has said that the statute precludes review "where anything further remains to be determined by a state court, no matter how disassociated from the only federal issue that has finally been adjudicated by the highest court of the state". *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120 (1945).

Exceptions to this rule have been made, which fall into four classes. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975). None of the four apply here. 1) The decision of the title question has no effect on the outcome on the remaining four causes of action. 2) On at least two of the remaining causes of action, the outcome could place ownership of the railroad in petitioners, thus making unnecessary a decision on the federal question. 3) If petitioners lose on the other causes, they can appeal them to the Minnesota Supreme Court. If they lose there, their right to then raise the present federal question by Petition for Writ of Certiorari is preserved. *Reece v. Georgia,* 350 U.S. 85 (1955). 4) Refusal to review now will not seriously erode any federal policy. As argued elsewhere in this brief, the state decision does just the opposite, *supporting* the federal policy of continuing the valuable rights-of-way resources in compatible public uses.

II. PETITIONERS' ARGUMENTS CONCERNING THEIR PROPERTY RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION ARE PREMATURE.

The state supreme court ruled that the change of use of a right-of-way from a railroad bed to a public recreational trail does not constitute an abandonment of that right-of-way for public travel. It did not rule on the nature of the title the Soo Line Railroad received from the original grantors. The state supreme court did not affirm or reverse the district court's determination that 13 of 14 deeds conveyed fee title. It simply held that there was no abandonment of a public use. Therefore, the issue of the nature of the original conveyance was moot. Since there was no final judgment on the nature of the original conveyance, there can be no appeal on that issue to this Court.

The jurisdiction of this Court to review a decision of a state supreme court is governed by 28 U.S.C. § 1257, subd. 3. There must be a final judgment on each issue petitioners request this Court to review. Yet petitioners are attempting to convince this Court to rule on their fifth and fourteenth amendment questions when the state supreme court has issued no ruling on who holds what property interest in the right-of-way. This Court in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), dismissed an appeal on the grounds that the judgment appealed from was not final for the purposes of 28 U.S.C. § 1257. In *San Diego* the state supreme court had failed to decide whether any taking had in fact occurred. There was a need for further state court proceedings to resolve the federal question whether there had been a taking of private property in violation of the United State Constitution.

In sum, this Court has no jurisdiction to consider petitioners' taking arguments until the state supreme court makes a determination on who owns fee title to the right-of-way.

III. THE DECISION OF THE MINNESOTA SUPREME COURT WAS CORRECT AND WAS CONSISTENT WITH THE RULINGS OF THIS COURT AND WAS BASED ON ISSUES OF STATE LAW.

The decision of the Minnesota Supreme Court was made on the basis of a voluminous set of exhibits, a thorough presentation of the facts and extensive briefing. The state supreme court in its opinion properly analyzed prevailing case law and accurately interpreted federal and state statutes. Specifically, the state supreme court's ruling that the change in use of a right-of-way from a railroad bed to a public recreational trail does not constitute abandonment of that right-of-way for public travel was based on a careful review of the language of the deeds and an analysis of case law concerning the continuous use of the right-of-way for public transportation.

The petitioners' challenge to the ruling of the Minnesota Supreme Court is based in part on a misinterpretation of the Interstate Commerce Commission (ICC) abandonment certificate. They confuse the statutory proceeding with the common law concept "abandonment." [5] The fatal defect in petitioners' argument is its effort to apply exclusive ICC jurisdiction over abandonment of *service* to abandonment of *right-of-way*. The ICC issued a certificate to the Soo Line Railroad

[5] Statutory abandonment is governed by 49 U.S.C. § 10903 which authorizes the ICC to permit a railroad company to end rail service on a particular railroad right-of-way. Common law abandonment of a railroad right-of-way requires a combination of actual nonuse of and intent to abandon the right-of-way for all uses.

permitting service abandonment. The certificate did not constitute abandonment of the right-of-way nor did common law abandonment occur as a result of any statutory action.

The most cursory reading of 49 U.S.C. § 10906 and cases decided under the Interstate Commerce Act relating to service abandonments, i.e. *Chicago and Northwestern Transportation Co. v. Kalo Brick and Tile Co.*, 450 U.S. 311 (1981) and *Hayfield Northern Railroad Co. v. Chicago and Northwestern Transportation Co.*, 693 F.2d 819 (8th Cir. 1982) demonstrate that there is no basis for extending exclusive federal jurisdiction over service abandonments to right-of-way abandonments.

The question before the Minnesota Supreme Court was whether the assumed easement had been "abandoned" in the common law sense. The state supreme court recognized the petitioners' confusion at page 21 of Petitioners' Supplemental Appendix where it stated that the issuance of the ICC certificate does not necessarily indicate an intention to abandon, citing *Hennick v. Kansas City Southern Ry. Co.*, 364 Mo. 833, 269 S.W.2d 646 (1954), and concluded that while the ICC certificate *permits* abandonment for *railroad purposes* the right-of-way was not automatically abandoned for all purposes of public travel.

In making this determination the state supreme court noted that although the grantors were aware a railroad would be constructed on the land, none of the deeds expressly limit the assumed easement to railroad purposes. The court correctly recognized that this right-of-way was acquired and held by the railroad to serve a public purpose. The court's decision followed a long line of cases ruling that the holder of an easement is "not limited to the particular method of use in vogue when the easement was acquired, and that other methods of use in and of the *general purpose* for which the easement was

acquired are permissible." *Hausler v. Braun*, 314 N.W.2d 4 (Minn. 1981); *Cater v. Northwestern Telephone Exchange Co., 60 Minn.* 539, 63 N.W. 111 (1895); *Bernards v. Link*, 248 P.2d 341 (Or. 1952); and *Faus v. City of Los Angeles*, 67 Cal. 2d 350, 62 Cal. Rptr. 193, 431 P.2d 849 (1967); *Marthens v. B. & O. Railroad Co.*, 289 S.E.2d 706 (W. Va. 1982).

In opposing the state supreme court's ruling petitioners make a weak attempt to show this Court the decision conflicts with the appellate court decisions of three states. (Petition for Writ of Certiorari, p. 14.) Both the Nevada and Illinois cases[6] can be easily distinguished by the language of the deeds. The deeds contained words referring specifically to the railroad right-of-way and the purpose of said right-of-way.

In the Illinois case, *Schnabel v. County of DuPage*, 101 Ill. App. 3d 533, 428 N.E.2d 671 (1981), cited by petitioners, there is also evidence of common law abandonment of the right-of-way. The record revealed that for a period of 25 years after the railroad removed its rails from the right-of-way, the premises had been unimproved and unoccupied. There was never a path or anything resembling a nature trail through or upon the right-of-way.

This is certainly not the condition of the right-of-way in Minnesota. The subject right-of-way is currently in use as a state trail.

In another Illinois case not highlighted by petitioners, *Klopf, v. Illinois Commerce Comm.*, 54 Ill. App. 3d 491, 369 N.E.2d 906 (1977), the appellate court made a ruling that use of an abandoned railroad line for a public travel does not amount

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[6] The cases in these states cited by petitioners are *City Motel, Inc., et. al. v. Nevada Dept. of Highways*, 75 Nev. 137, 336 P.2d 375 (1959), *Schnabel v. County of DuPage*, 101 Ill. App. 3d 533, 428 N.E.2d 671 (1981).

to the taking of private property without just compensation. In approving the Illinois Commerce Commission's findings, the appellate court found that the

> property in question is affected with a public interest although no longer required for the specific purposes of this railroad utility. The record discloses the right-of-way which the Department [of Conservation] wishes to preserve for general public access is unique and eminently suitable for use as a nature trail and for related activities.

Id. at 912. Even Illinois recognizes a change in use of a right-of-way does not constitute abandonment.

Petitioners also rely heavily on *Pollnow v. State Dept. of Natural Resources*, 88 Wis. 2d 350, 276 N.W.2d 738 (1979). (Petition for Writ of Certiorari, p. 32.) Respondents argued vigorously in their brief before the state supreme court at pages 12 through 14 that *Pollnow* is not controlling. The state supreme court agreed. (Petitioners' Supplemental Appendix, pp. 18-20.) At the time of the sale of the right-of-way in *Pollnow*, Wisconsin did not have a law addressed to acquiring railroad rights-of-way and Congress had not yet enacted 49 U.S.C. § 10906. In fact, the federal statute was not in effect when the railroad lines in the Illinois and Nevada cases cited by petitioners were statutorily abandoned.

Petitioners' favoritism argument is clearly without merit (Petition for Writ of Certiorari, p. 34) and in any event the question of abandonment of title to real property has long been considered an issue of state substantive law. *United States v. Denby*, 552 F.2d 1358 (5th Cir. 1975). The interpretations of the various states are not controlling in Minnesota and are not grounds on which to seek the intervention of this Court.

Even the Interstate Commerce Commission has recognized that when continued rail service is not involved, the question of disposition of rights-of-way is a matter for state law. As quoted in the *Hayfield Northern Railroad Co. v. Chicago & Northwestern Transportation Co.*, 693 F.2d 819 (8th Cir. 1982), the commission said in *Ex Parte* No. 274, 349 C.F.R. 1121 (365 I.C.C. 249-1981): "The Commission has been granted only limited jurisdiction to direct a sale; under 49 U.S.C. 10905 we can require a sale which will *'provide continued rail service'. In all other instances the disposition of rail property after an effective certificate of abandonment has been exercised is a matter beyond the scope of the Commission's jurisdiction, and within a state's reserved jurisdiction. Questions of title to and disposition of property are matters subject to state law.*" (Emphasis supplied)

It is indeed a novel doctrine to suggest that an owner of land abutting a railway right-of-way has a constitutional right to a reversion or to a termination of the easement immediately upon abandonment of railway operations pursuant to ICC order and that the sovereign states of the United States have no judicial power to determine the scope, extent and use of an easement right-of-way under long-established state property law rules. Petitioners are in effect asking the United States Supreme Court to develop a whole new body of federal common law property law in an area that has, up to this time, been considered by all concerned to involve exclusively questions of state property law. Surely, this is something this Court is not prepared to do.

Petitioners also argue Minn. Stat. § 84.029, subd. 2 is unconstitutional. (Petition for Writ of Certiorari, pp. 35-36.) Once again petitioners exhibit their mistaken analysis of the term "abandoned." The state supreme court's decision (Peti-

tioners' Supplemental Appendix, pp. 20-21) addressed this argument fully and recognized correctly there is no merit to petitioners' argument. The state statute is not repugnant to the United States Constitution.

IV. THE DECISION OF THE MINNESOTA SUPREME COURT IS CONSISTENT WITH FEDERAL LAW.

Petitioners place major importance on their argument that Minnesota Department of Natural Resources purchased the right-of-way beyond the 180-day negotiation period authorized by the Interstate Commerce Commission. (Petition for Writ of Certiorari, pp. 21-27.) Petitioners' arguments are misdirected.

A careful reading of 49 U.S.C. § 10906 reveals that the ICC may order that for a period of 180 days the right-of-way may not be disposed of unless such sale is for public purposes. The ICC Certificate and Order, dated October 7, 1977, contains this 180-day prohibition. The Soo Line Railroad was forbidden to sell the right-of-way to anyone other than the Department of Natural Resources for 180 days. (Appendix, A-4, para. 4.) The ICC certificate authorizing abandonment is "conditioned on a public use in accordance with the plans of the Minnesota Department of Natural Resources." (Appendix, A-3, para. 2.)

The purpose of 49 U.S.C. § 10906 and the Certificate and Order is to encourage the conversion of railroad rights-of-way to other public purposes. A review of the legislative intent reveals this to be the purpose of the statute. The policy behind 49 U.S.C. § 10906 is found in Pub. L. No. 94-210, § 810(a) which states, "[c]areful consideration is to be given to future public use of abandoned railroad rights-of-way and adequate

funds are to be provided for conversion to alternate public uses, where appropriate." In addition, subsection (c) authorizes the Secretary of the Interior to provide assistance to local, state and federal governmental entities for programs involving the conversion of abandoned railroad rights-of-way to recreation and conservation purposes.[7]

Accepting petitioners' contention on page 24 of their petition that the 180-day negotiation period ran from January 23, 1980 until July 21, 1980,[8] the Soo Line should have been nego-

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[7] 1975 U.S. Code Cong. and Adm. News, Legislative History, 131.

[8] Petitioners state the 180-day negotiation period ran the first half of 1980. This is based on an ICC decision dated January 2, 1979 extending the time for effectuating the sale of a separate portion of the right-of-way to Burlington Northern, Inc. to January 23, 1980. The 180-day period would run from January 23, 1980 to July 21, 1980. The original 180-day period for Soo Line Railroad to negotiate with Burlington Northern, Inc. expired on April 7, 1978. Such an extension of the negotiation period nine months after it had expired is evidence the ICC considers the negotiation time limits directory, not mandatory.

The mandatory/directory question has been before the courts. In *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977), the Micronesian Laws Commission was ordered to "wind up its affairs as expeditiously as possible, and in any event not later than three years after the expiration of the time for filing claims under this act." *Id.* at 626.

The three-year deadline was not met. The court interpreted the language of the statute as directory reasoning that where treating the provisions as mandatory would work hardship on claimants they would be read as directory. "We prefer a constuction that bestows the benefits of the Act on those for whom it was chiefly intended." *Id.* at 628.

The legislative history of 49 U.S.C. § 10906 indicates the 180-day rule was intended to encourage the Soo Line Railroad to negotiate a sale with the Minnesota Department of Natural Resources. A finding that the 180-day negotiation period is directory effectuates the legislative intent.

tiating exclusively with the Minnesota Department of Natural Resources during that period. Yet it is interesting to note that during this 180-day period the petitioners attempted to negotiate a sale with the railroad.[9] This activity interfered with the provisions of the ICC Certificate and Order and most likely delayed negotiations between the railroad and the Minnesota Department of Natural Resources. At the end of the 180-day period petitioners' final offer had been rejected by the railroad.[10]

The ICC Certificate and Order and 49 U.S.C. § 10906 contain no restrictions concerning sale of the right-of-way after the 180-day period. Once the 180-day period terminated the Soo Line Railroad could sell the line to any willing buyer. The railroad chose to sell the right-of-way to the Minnesota Department of Natural Resources.

Petitioners err in arguing the Minnesota Supreme Court extended the 180-day period. Rather, the court approved a sale that occurred beyond the 180-day period, a time Congress has chosen not to regulate. There is no challenge to ICC exclusive jurisdiction over authorizing the termination of rail services over a right-of-way.

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[9] The Affidavit of Stanley Mrosak, dated March 18, 1981, reveals that from April, 1980 until July, 1980 the petitioners presented several purchase agreements to the Soo Line Railroad, all of which were rejected.

[10] Affidavit of Stanley Mrosak, dated March 18, 1981.

CONCLUSION

The decision of the Minnesota Supreme Court was correct and was consistent with the rulings of this Court and with federal law. It is based on issues of state law. Petitioners' arguments are based on misinterpretation of federal and state law. Additionally, petitioners' argument under the fifth and fourteenth amendments to the United States Constitution are premature and it is doubtful this Court has jurisdiction to hear any part of this case. Therefore, certiorari should be denied.

Dated: May, 1983

Respectfully submitted,

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APPENDIX

EXHIBIT A
INTERSTATE COMMERCE COMMISSION
CERTIFICATE AND ORDER
Docket No. AB-57 (Sub-No. 6)

SOO LINE RAILROAD COMPANY ABANDONMENT NEAR NORTH ST. PAUL AND CARNELIAN JUNCTION, IN WASHINGTON COUNTY, MINNESOTA

On August 15, 1977, the Soo Line Railroad Company filed an application for a certificate of public convenience and necessity permitting the abandonment of that portion of its line of railroad extending from milepost 438.33 located easterly of North St. Paul and milepost 428.45 at Carnelian Junction, a distance of 9.88 miles, all points located in Washington County, Minnesota. The application is governed by Section 1a of the Interstate Commerce Act (the Act) and by the Commission's Regulations Governing the Abandonment of Railroad Lines and the Discontinuance of Rail Service, 49 C.F.R. Part 1121 (the Regulations).

The application was filed under the "summary" procedures of Section 1121.33, which are designed to facilitate the filing and processing of abandonment applications to which little or no opposition is anticipated. Public notice of the filing of the application has been given in compliance with the Regulations. It is noted that this summary application covers the line from milepost 428.45 to 438.33, 1.44 miles less than the line description accompanying the applicant's system diagram map of April 12, 1977.

In support of its application, Soo Line states that there has been no passenger train traffic over the line for a period of

more than ten years and that no freight trains have been operated over the line for five years, with the exception of two detours over the line when the regularly used lines were out of service. In addition, no shippers or receivers of rail freight traffic are located on the line to be abandoned. The Soo Line does not expect any traffic to be generated over the line in the forseeable future.

No written comments in support of the application have been filed by other parties.

Subject to the conditions for the protection of railway employees as hereinafter provided, the abandonment by the Soo Line Railroad Company of that portion of its line of railroad in Washington County, Minnesota, between milepost 438.33 located easterly of North St. Paul and milepost 428.45 at Carnelian Junction, a distance of 9.88 miles, is permitted by the present and future public convenience and necessity. Having determined that the public convenience and necessity permit the abandonment, Section 1a(10) of the Act requires the Commission to find whether or not the properties are suitable for use for other public purposes, including other forms of mass transportation, conservation, or recreation. This section of the Act also empowers the Commission to prescribe reasonable terms and conditions, and prohibitions on the disposal of the rail properties.

Applicant is negotiating an agreement with Burlington Northern, Inc. (BN) to acquire that part of the line to be abandoned between milepost 438.33 and Duluth Junction at milepost 433.67. In addition, the negotiations include the acquisition of operating rights over the applicant's line from Gloster at milepost 443.0 to North St. Paul at milepost 438.33. The applicant further indicates that the balance of the line would be suitable for other purposes such as recreation and

conservation. An environmental assessment prepared by the Commission's Section of Energy and Environment reports the finding by the Department of Natural Resources that the entire right-of-way is suitable for a bicycle route.

In balancing these interests, continued rail service to eastern Washington County would be accomplished through the proposed agreement between BN and the applicant. Hence, while permitting the abandonment by the Soo Line, it will be conditioned on a public use in accordance with the plans of the Minnesota Department of Natural Resources. However, on the segment of the line under negotiation between the applicant and BN, it is required that BN have the right of first refusal prior to public authorities.

This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is hereby found:

That the present and future public convenience and necessity permit abandonment by the Soo Line Railroad Company of its above-described line of railroad, subject to the conditions:

1. That employees shall be entitled to protection as enacted in and developed pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. §565);

2. That abandonment of the rail line will not result in a serious adverse impact on rural and community development; and

3. That the properties to be abandoned are suitable for other public purposes.

It is ordered, therefore:

1. That, in absence of any timely petitions to investigate of record, the requirement of Section 1121.38(a) of the Reg-

ulations that publication of notice of abandonment decisions in the *Federal Register* be made only after such a decision becomes administratively final be, and it is hereby, waived; that notice of findings heretofore made be submitted for publication in the Federal Register on the date of service hereof; and that applicant railroad shall, within 10 days after receiving notice that an offer of financial assistance is being considered, comply with informational requirements of Section 1121.38 of the said regulations.

2. That all correspondence to the Commission with respect to offers of financial assistance for the continued operations or acquisition of the subject line shall contain an appropriate reference to the subject proceeding, and on the lower left hand corner of envelopes containing such correspondence the following notation shall be typed in boldface "Section of Finance", "AB-RSCP".

3. That with respect to that segment of the line under negotiation for continued rail service between Soo Line Railroad Company and Burlington Northern, Inc., BN shall have the first right of refusal prior to the offer of the line of railroad for public use, as described above.

4. That with respect to the remaining portion of the line, the Soo Line shall not sell, lease, exchange or otherwise dispose of the property along that portion of the above-described line of railroad for a period of 180 days, commencing with the effective date of this certificate and order prescribed in the eighth ordering paragraph below, unless a binding agreement for the use of the properties has been negotiated between the Soo Line Railroad Company and the Minnesota Department of Natural Resources, or unless otherwise ordered by this Commission.

5. That, in the event abandonment is effected, tariffs applicable to the line herein permitted to be abandoned may be canceled upon not less than 10 days' notice to this Commission under section 6 of the Interstate Commerce Act; and that when filing schedules canceling tariffs applicable to said line, the applicant shall, in such schedule refer to this certificate and order by date and docket number;

6. That if the authority granted in this certificate and order is not exercised within one year from its effective date, it shall be of no further force and effect.

7. That this certificate and order shall be effective 45 days after the date of publication of notice in the *Federal Register* unless otherwise ordered by this Commission.

8. That only to the extent this certificate and order is applicable to the portion of the line under negotiation for continued rail service, the above effective date shall be postponed for a period of six months to allow the parties time to negotiate and enter into an agreement as provided in section 1(a)(6) of the Interstate Commerce Act; provided, that in order for any proposal to be consummated the appropriate application under the Interstate Commerce Act is filed, and approved by the Commission.

9. That during the postponement period BN and Applicant shall inform the Commission of the progress of their negotiations by the 1st day of each month, except that the final progress report shall be filed with the Commission two weeks before the period of postponement in paragraph 8 expires.

Dated at Washington, D.C., this 7th day of October, 1977.

By the Commission, Commissioner Brown

(SEAL)

H. G. HOMME, JR.,
Acting Secretary.

END OF DOCKET